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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1352

HART BOOKS STORES, INC., et al.,

Petitioners,

v.

RUFUS EDMISTEN, et al.,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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Petitioners Hart Book Stores, Inc.; Raleigh Books, Inc.; Tri-State News, Inc.; Jessie F. Frye, Jr., d/b/a L & J Newsstand; Thomas Page, d/b/a Player's Bookstore; Joseph Raymond McBroom, d/b/a M Distributors; Larry Gene Moore, d/b/a E. & M. EnterPrises; Camera's Eye, Inc.; and Mind's Eye, Inc., d/b/a Mind's Eye and Imperial Bookstore respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding December 4, 1979, and

on which a rehearing was denied on January 10, 1980.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F.2d , reh. den., and is reproduced as Appendix A-1, with the Order denying rehearing reproduced as Appendix A-2.

The opinion of the United States District Court for the Eastern District of North Carolina is reported as 450 F.Supp. 904 (E.D.N.C. 1978) and is reprinted as Appendix C.

The opinion of the United States District Court for the Western District of North Carolina is unreported. The Court's Memorandum of Decision and Findings of Fact and Conclusions of Law are reprinted as Appendix B.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 4, 1979. A petition for rehearing was denied by Order entered January 10, 1980. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101 (c).

QUESTIONS PRESENTED.

I. Do the North Carolina State Statutes which prohibit the simultaneous sale of predominantly sexually oriented publications and the exhibition of

predominantly sexually oriented motion picture films in the same building, premises or structure violate the First and Fourteenth Amendments to the United States Constitution because they deprive such stores, their customers, and those producing sexually oriented materials freedom of speech and freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution and also deprive them of other Constitutional rights as the price for exercising First Amendment rights?

II. Is the statutory scheme unconstitutional because it deprives the bookstores of Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

III. Is the statutory scheme unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution because it proscribes the simulataneous sale of sexually oriented books and the exhibition of sexually oriented movies in the same "building, premises, structure or other facility . . ." based on whether or not most of the constitutionally protected material is "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas. . ."?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States:

AMENDMENT I.

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes §§14-202.10 through 14-202.12 (cum. supp. 1979):

§14-202.10. Definitions. As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an

adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing,, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(7) "Sexually oriented devices" means without limitation any artificial or simu-

lated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.

(8) "Specified anatomical areas" means:
a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means
a. Human genitals in a state of sexual stimulation or arousal;
b. Acts of human masturbation, sexual intercourse or sodomy; or
c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§14-202.11. Restrictions as to adult establishments. No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment.

§14-202.12. Violations; penalties. Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three

hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court.

STATEMENT OF THE CASE.

On January 1, 1978, the North Carolina statutory provisions quoted above became effective. These statutory provisions, by their essential terms, prohibit constitutionally protected, non-obscene, sexually oriented literature from being made available to the public in the same store where constitutionally protected, non-obscene, sexually oriented movies are offered for public viewing, if a "preponderance" of the literature and the movies emphasize, depict, describe, or relate to proscribed sexual content.

These cases were brought by a number of bookstores in the District Courts for the Eastern and Western Districts of North Carolina to challenge the constitutionality of North Carolina General Statute §14-202.10, et seq. Both District Courts found the statutes unconstitutional. Their decisions were reversed on consolidated appeal by the Fourth Circuit. The bookstores now ask this Court to review that decision by the Fourth Circuit.

The jist of the statutory provisions is

that the constitutionally protected dissemination of printed matter and movie pictures previously carried on in one building, under one roof, may no longer be carried on in the same building. Nor may a bookstore selling a "preponderance" of adult publications or showing a "preponderance" of adult movies sell any sexual devices -- including contraceptives. The statute permits, however, the very same activities it condemns in an adult business to be carried on in a building next door -- provided the business next door is engaging in only a single constitutionally protected activity. This statutory scheme, as the respondents have conceded throughout this litigation, is not aimed at obscenity as defined by this Court in Miller v. California, 413 U.S. 15 (1973).

The facts before both District Courts clearly established that the petitioner's establishments were targets of the statute and were threatened with imminent prosecution. (A. 47, A56, A65). Both District Courts and the United States Court of Appeals for the Fourth Circuit therefore reached the merits of the bookstores' claims.

The District Court for the Eastern District of North Carolina found certain facts. It found that at the time of the complaint the bookstores all operated businesses which primarily sold sexually oriented books and primarily exhibited sexually oriented motion picture film and which also sold contraceptive devices and that these activities all took place under the same roof. (A. 65). The bookstores' customers were required to verify their ages before being permitted to enter except in Raleigh Books where a front section of the bookstore selling books, magazines and newspapers

from major publishers was open to the general public and a back section selling sexually oriented material was restricted to adults. (A. 65).

The Eastern District also found that, after the statute became effective and in order to avoid prosecution, Hart Books, Tri-State, Raleigh Books and Frye all acquired enough non-sexually oriented books to outnumber their sexually oriented books. All of them abandoned the sale of sexually oriented devices, which in Raleigh Books and Tri-State News, Inc. included the sale of prophylactics. (A. 66). The Court further found that the bookstores objected to carrying (as over one-half of their publication inventory) non-sexually oriented books. "This necessity [of maintaining a 51% non-sexually oriented inventory] has restricted their ability to sell and display sexually oriented publications since much of theirspace is now devoted to non-sexually oriented books." (A. 66).

The Eastern District also found that Raleigh Books had always sold ordinary paperback books and magazines of the sort available on any newsstand. The District Court found as a fact that with the passage of the statute Raleigh Books had to try to avoid paperback books from major publishers which might be said to emphasize sexual matters. While it carried some books in that category, it had to avoid carrying too many for fear of "tipping" its inventory. The Court found that the corporation was concerned that its scrutiny of these books might not be completely successful and that it might be prosecuted in any case. It found as a fact that the corporation would like to be able

to carry books from major publishers without worrying about whether or not the books emphasize sexual matters. (A. 66-A67). The Court found as a fact that when Hart's Book Store purchased non-sexually oriented books in order to comply with the statute it had to avoid the book Fanny Hill and similar books which emphasize sexual matters. (A. 66).

The Court found the effect of the statute (so long as the bookstores exhibited primarily sexually oriented films) was to require them to carry certain categories of books, and to refrain from carrying others, at least in certain numbers, as a condition of being permitted to sell sexually oriented books which were protected by the First Amendment. (A. 67).

The Eastern District found the State's proposed justification for the statute unpersuasive. It found as a fact that the bill's sponsor had heralded the bill as one which would raise the overhead of adult bookstores and drive them out of business, but it found that such a State interest could not justify the statute (A. 61, A63, A68). The Court further found nothing to justify an assumption that the quality of life would be in any way improved by the separation of functions required by the statute. And it found that, if the statute were aimed at sexual conduct, regulation of sexual conduct could be more narrowly achieved without interference with First Amendment Rights. (A. 63-A64, A68-A69).

In its decision the Eastern District

found that the statute resulted in a substantial infringement of First Amendment rights and that it was incumbent upon the defendants to establish a compelling justification. (A. 59). Finally the Court concluded "the statute only suggests an increase in the number of outlets, at some expense to First Amendment freedoms, and in furtherance of no permissible State purpose. Thus, the Court is unable to conclude that the purported justification is sufficiently substantial to outweigh First Amendment rights involved." (A. 63).

Facts found by the United States District Court for the Western District of North Carolina were similar, but not identical. The Western District found as a fact that the reduction of availability of sexually oriented material may well occur as a result of the statute. (A. 48). It also found there was nothing before the Court to justify the conclusion that the quality of life would be appreciably improved by the regulatory scheme established by the statute. (A. 48). It also found the following significant facts:

> The statute represents a substantial burden on the plaintiffs' First Amendment rights; it substantially increases the overhead costs of their stores; it interferes with the plaintiffs' rights to choose the types of material protected by the First Amendment which they will carry and sell or exhibit in their stores; it cannot be justified as a "zoning ordinance" or an "innovative land use regulation", since it does not in any way affect the location or concentration

of the stores selling sexually oriented material."

(A. 48-A49).

On consolidated appeals, the Fourth Circuit (contrary to findings of fact below) concluded that the effect of the statute on the availability of sexually oriented books would be minimal since several plaintiffs below had opted for compliance. However, as Judge Dupree's findings of fact show, the stores which complied had to raise their publication inventories of non-sexually oriented books to at least 51%, necessarily restricting the variety and number of sexually oriented publications which they carried and which were available to their patrons by slightly more than half. As a result patrons' access to sexually oriented books was dramatically reduced. This is so because bookstores have only a finite amount of space in which to sell and display books.

In sum, Judge Franklin T. Dupree, sitting in the Eastern District, held the statutory scheme to be in violation of the bookstores' First Amendment rights and also to violate equal protection guarantees under the Fourteenth Amendment. Judge James B. McMillan in the Western District concluded that the state act violated First, Ninth, and Fourteenth Amendment guarantees of freedom of speech, privacy, and equal protection, and that the law was also unconstitutionally vague.

Upon the consolidated appeal of the cases, the Fourth Circuit, ignoring the substantial findings of fact by the two

trial courts, in contravention of Rule 52(a) of the Federal Rules of Civil Procedure, reversed on the theory that the statutory scheme imposed only "incidental" restrictions on expression. The Fourth CIrcuit ruled that a rational basis for the law was all that needed to be, and actually was, satisfied. The Fourth Circuit discounted the equal protection, vagueness, and privacy challenges to the state statutes.

The basis for jurisdiction in the District Courts below was predicated upon 42 USC §1983 and 28 USC §1343 (deprivation of Constitutional rights under color of state law), 28 USC §1331 (federal question jurisdiction), 28 USC §§2201, 2202 (declaratory relief), and 28 USC §2284 (injunctive relief).

REASONS FOR ALLOWING THE WRIT.

The North Carolina statutes at issue represent a tremendously important, absolutely unwarranted, and perhaps inevitable attempt by a state legislature to extend this Court's decision in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), to criminally punish the dissemination of and to prohibit or impede public access to constitutionally protected forms of expression because of legislative hostility to the content of that expression. Thus, this cases raises First Amendment issues of the most fundamental importance. It raises the question of whether books and magazines which relate to sexual matters but which do not meet the test for obscenity may be discriminated against and the distribution of such publi-

cations may be discouraged if the State has a mere "rational basis" for doing so and it raises the question of whether the facts in the present case afford even a rational basis for interfering with First Amendment rights. On these points the decision of the Fourth Circuit has established a novel, and highly significant, and completely unfounded First Amendment doctrine. By the Fourth Circuit's decision legislation infringing on First Amendment rights is sufficiently "rational" to foreclose judicial inquiry even if "practically [inept]", "sheer silliness" or even assinine in terms of accomplishing its objective. (A.42).

Now that the bizarre infringement of First Amendment rights countenanced by the North Carolina statute has been approved by the United States Court of Appeals for the Fourth Circuit, it is likely to be copied and applied throughout the nation. Even in its present form the statute provides a substantial means of harrassing sellers of sexually oriented publications. It has substantially restricted the channels of communication for sexually oriented books and magazines. (A. 48, A66). With slight modifications the statute can represent an even more successful device for the suppression of non-obscene sexually oriented literature. Particularly disturbing is the possibility of the combination of North Carolina statutes with zoning ordinances such as those approved in Mini-Theaters.

Even worse, the principle underlying the statute can justify even wider suppression

of First Amendment rights than that undertaken so far. By the logic of the Fourth Circuit's decision, the State could decree that ordinary bookstores may not sell an appreciable number of sexually oriented books such as the Joy of Sex in pursuit of the "rational" objective of shielding young people and unwilling viewers from such materials. Or the State could provide that sexually oriented books could not be sold in regular bookstores at all. Since the nation is well-supplied with those who would regulate the reading habits of others, it is reasonable to expect that the possibility of suppression allowed by the Fourth Circuit's opinion will be thoroughly exploited. The Writ of Certiorari should be granted because the Fourth Circuit's opinion is contrary to all prior opinions of this Court.

The Fourth Circuit relied upon Mr. Justice Powell's concurring opinion in Mini-Theaters as the basis for developing the bizarre First Amendment Doctrine it developed in this case. The expression singled out for regulation by the North Carolina Legislature in adopting the statutes at issue here is in many respects identical to that which was offered in the theaters which were the subject of the Detroit "anti-skid row" zoning ordinance dealt with in Mini-Theaters. The means by which the expression is monitored or prohibited under the North Carolina scheme, however, is vastly different from that which was approved by the Court in Mini-Theaters.

1. The Detroit ordinance in Mini-

Theaters made no attempt to dictate the contents of the expression which could be offered or to which access could be gained in any single store. Rather, the government stayed entirely out of the business of monitoring what form of literature or movies or expression could or could not be offered or obtained in any business, so long as the establishment was sufficiently far away from another regulated establishment that the integrity of the urban environment was not compromised. The North Carolina statute, conversely, thrusts the State in the position of regulating the content of expression offered in any single store. If a "preponderance" of the literature and if a "preponderance" of of the movies are of the type prohibited by the act, they may not be offered on the same premises. The proprietors, the customers and the distributors of the expression must offer or obtain the particular expression in an entirely different location -- if, indeed, it is economically possible to maintain such an alternate establishment or physically possible to gain access to it. The City of Detroit regulates certain land uses in an across-the-board fashion, while the State of North Carolina, as censor, scrutinizes the contents of literature and movies offered in individual premises, and suppresses one or more forms of the expression unless it can be reduced below a preponderance or relocated elsewhere.

2. The ordinance in Mini-Theaters served the overriding city purpose of pre-

serving the urban environment by permissible and traditional zoning techniques. The North Carolina statute has no apparent purpose, other than to make it commercially impossible to operate an "adult" business. An establishment may sell a preponderance of "adult books" in a theater or show a preponderance of adult movies, but it may do no combination of the above. Nor may it sell "sexually oriented devices," including contraceptives, where an "adult establishment" is operating. The adult establishments must be split up: Whether next door, to the next block, by the schoolyard or into the suburbs, the act does not regulate. Prior to the legislation, persons desiring access to the expression or items here at issue could gain them at a particulary appropriate site, an "adult establishment" which was at a single location, closed to minors, and shielded from unwilling viewers. That is currently impossible, and for no apparent reason. No evidence was presented (and it is hard to imagine any) concerning why or how offering a preponderance of "adult books" is significantly different from offering less than a preponderance of "adult movies" for viewing. The State interest in compelling this peculiar result is, at best, elusive, and uncontrovertedly, is without any evidentiary basis in the record. The State might just as well have attempted to proscribe the works of Shakespeare and of Chaucer from being sold simultaneously in the same establishment, based upon a vague assertion of its police powers.

3. The Mini-Theaters ordinance, a

zoning regulation, had prospective application only, affecting none of the "adult establishments" already extant in Detroit. The North Carolina statute applies not only to new enterprises, but compels compliance by establishments which were doing business before the act was passed, and which have been forced to drastically sacrifice their operations to attempt to comply with the statute. Further, the North Carolina legislation is a criminal statute designed to criminally punish people for offering the proscribed types of expression; it makes no pretense of being a zoning or land use regulation.

4. The Court in Mini-Theaters was able to conclude that availability of the regulated expression would not be affected by the zoning ordinance, given the size and composition of the city of Detroit. 427 U.S. at 72, n.35. In contrast, the State of North Carolina is characterized by cities and towns of modest population, the economic bases of which are not likely or certain to sustain, as going business concerns, individual establishments which offer one and only one type of "adult expression." Indeed, affidavits submitted by various of the petitioners demonstrate that access to one or more types of the expression here at issue may well dry up, as it becomes economically impossible to maintain separate businesses, with attendant overhead costs, salaries, etc., to offer only one form of the regulated expression. Both trial courts specifically found as facts that the North Carolina statute will undoubtedly effectively suppress or greatly restrict access to lawful forms of speech across the state.

(A. 48, A66).

5. The vagueness aspect of the ordinance in Mini-Theaters was not squarely addressed because of the clear applicability of the regulation to the respondents in the case. Here, the vagueness issue must be considered because of terms in the statute which significantly affect the petitioners' own rights, which are uncertain in scope, and which will deter the petitioners from exhibiting films or offering literature which may or may not be prohibited under the act.

6. Finally, there is a right of privacy put in issue by the North Carolina legislation which was not asserted in Mini-Theaters. No building which contains "sexually oriented devices" (defined so as not to be exclusive of contraceptive devices) may also contain an "adult establishment"(where constitutionally protected expression may be housed). This compromise of Ninth Amendment and First Amendment interests -- one, but not both might be realized -- is another consideration mandated under the North Carolina act.

In this section below, the specific constitutional provisions and authorities upon which the bookstores rely, and which demonstrate that the North Carolina law is an important and impermissible attempt to restrict constitutionally protected principles, will be set forth.

I. THE NORTH CAROLINA STATUTE PROVIDING THAT BOOKSTORES SELLING PRIMARILY SEXUALLY ORIENTED BOOKS MAY NOT ALSO EXHIBIT PRIMARILY SEXUALLY ORIENTED MOTION PICTURES IN THE SAME BUILDING, STRUCTURE, ETC. VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT DEPRIVES SUCH STORES, THEIR CUSTOMERS, AND PRODUCERS OF SEXUALLY

ORIENTED MATERIAL OF THEIR RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEPRIVES THEM OF OTHER CONSTITUTIONAL RIGHTS.

A. The statute suppresses protected expression including political expression.

The statute in the present case (as the respondents have always conceded) is not aimed at controlling the dissemination of obscenity as defined by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). In fact, the statute reaches political speech which should be entitled to the full protection of the First Amendment. An examination of the statute and the findings of fact by the trial courts in these two cases show political speech will be suppressed (at least partially) in petitioners' bookstores.

Magazines such as Playboy may well emphasize and certainly relate to sexual matters. Still such magazines have their Playboy philosophies, including a number of political beliefs: criticism of obscenity laws; criticism of laws restricting sexual conduct of consenting adults in private; and the like. By their advocacy of certain forms of sexual conduct now prohibited by North Carolina and other states, books like the Joy of Sex are direct criticisms of the assumptions underlying such statutes. See, for example, the discussion of normality in the Joy of Sex, p. 78 (Crown, 1972); and the discussion of "pornography" in the same book. (p. 204):

> pornography
>
> Name given to any sexual literature somebody is trying to

> suppress. Most normal people enjoy looking at sex books and reading sex fantasies, which is why abnormal people have to spend so much time and money suppressing them. . .

The Kinsey Report also falls within the statute's definition of the sort of literature which may get petitioners' bookstores into trouble if they carry too much of it at once. However, the political importance of the Kinsey Report is beyond doubt.

Many may find books such as Playboy and the Joy of Sex annoying, disgusting, and wrong. Still such books have political or ideological import. To suppress them, or countenance measures which lead to their suppression, even in certain locations, or to restrict the channels of communication through which they are distributed, is a step toward undermining the central purpose of the First and Fourteenth Amendments.

The films and literature which the North Carolina statutory scheme has its direct impact on are forms of expression fully protected by the First and Fourteenth Amendments. Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (Powell J., concurring, and Stewart, Brennan, Marshall, and Blackmun, J.J., dissenting); Edwards v. South Carolina, 372 U.S. 229 (1963) (First Amendment applies to the states through the Fourteenth Amendment). As the Court noted in Roth v. United States, 354 U.S. 476, 487 (1954):

> [S]ex and obscenity are not synonymous . . . . [P]ortrayal of sex, e.g., in art, literature,

> and scientific works, is not itself sufficient reason to deny material the constitutional protection of speech and press. Sex, a great and mysterious motive force of human life, has indisputably been the subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

B. The effect of the statute on the availability of sexually oriented, constitutionally protected, materials is substantial.

As noted above, the Eastern District found as a fact that the North Carolina legislation restricted the adult stores' ability to sell and display sexually oriented publications since much of their space had to be devoted to non-sexually oriented books in order to comply with the statute. Most of the stores responded to the statutory scheme by raising publication inventories of non-sexually oriented books to 51% or more. This step was taken to enable the adult bookstores to continue in the business of showing sexually oriented movies or mini-movies.

The effect of the statute on access to the bookstores by patrons and producers of sexually oriented publications is, therefore, exactly the same as if the legislature had passed a statute stating that no bookstore could carry as over 50% of its publication inventory sexually oriented books. The result is to close approximately 50% of the channel of communication which has previously existed in petitioners' stores for sexually oriented

material.

This Court's plurality opinion in Mini-Theaters noted, in reaching its conclusion, that:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp. at 370. [427 U.S. at 71 n.35.]

And in his concurring opinion in Mini-Theaters, Mr. Justice Powell stated even zoning legislation cannot (1) impose a limitation on the content or availability of matter protected by the First Amendment, and (2) restrict in any significant way patrons' access to such matter. 427 U.S. at 78. The North Carolina legislation fails both prongs of Justice Powell's test, and enjoys none of the factual basis relied on by the plurality in Mini-Theaters. Here, factual findings by both trial courts are contrary to those

found by the Federal District Court in Michigan which took evidence on the Detroit Ordinance involved in Mini-Theaters.

The Fourth Circuit's conclusion that "thus far the adult establishments involved here have apparently opted for compliance rather than closing, so that the overall availability of their materials would seem to be little effected" (A. 18, emphasis added) shows that the Fourth Circuit panel overlooked or ignored the findings made by the trial courts below. As has already been pointed out, the Eastern District found facts tending to show that approximately 51% of the channel of communication for sexually oriented books had been eliminated by the effort of the adult bookstores to comply with the statute. Such ignoring or overlooking undisputed findings of fact by the two trial courts is a clear violation of Rule 52(a) of the Federal Rules of Civil Procedure.

In sum, the Fourth Circuit was entirely wrong in relying upon either the plurality opinion in Mini-Theaters or Mr. Justice Powell's concurring opinion to uphold this pernicious North Carolina Act. As a matter of fact, the North Carolina statutes directly impact -- rather than merely indirectly -- on expression fully protected by the First Amendment. Also, unlike the situation in Mini-Theaters, the record made in the two trial courts in this case factually shows that the North Carolina legislation will substantially affect the availability of the expression which the North Carolina legislature does not like and therefore seeks to directly curtail.

C. The Fourth Circuit's conclusion that a mere rational relation is sufficient to justify legislation infringing on First Amendment rights is contrary to prior opinions of this Court.

The Fourth Circuit made a serious mistake in fundamental First Amendment law when it suggested that where First Amendment values are at stake, "a legislative approach need simply be rationally related to the State's objective when [the statute was] enacted. . ." (A. 35 , emphasis supplied). Even if legislation infringing on First Amendment rights were "practically [inept]," "sheer silliness" or "assinin[e]" the Fourth Circuit suggests such an interest would be sufficient to overcome First Amendment rights.

With all due respect, this is simply not the law. To impact upon First Amendment rights, the state must demonstrate a compelling interest. New York Times v. United States, 403 U.S. 713 (1971). Furthermore, an "important or substantial burden rests upon the state when it would limit in any way First Amendment rights, [and] it is necessary to identify with specificity the nature of the infringement in each case," Young v. American Mini-Theaters, Inc., 427 U.S. 50, 76 (1976) (Powell J., concurring) (emphasis added).

The words of Justice Rutledge in Thomas v. Collins, 323 U.S. 516, 529-30 (1944) still accurately reflect the state of the law:

> [A]ny attempt to restrict [First Amendment liberties] must be

> justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. [Emphasis added.]

The Fourth Circuit erroneously relies on Paris Adult Theater v. Slayton, 413 U.S. 49 (1973) to justify its rational basis approach to First Amendment problems. In doing so, the Fourth Circuit evidently failed to take note of the following language from the Paris opinion itself: "It is not for us to resolve the empirical uncertainties of State legislation, save in the exceptional case where that legislation plainly impinges on rights protected by the Constitution itself." 413 U.S. at 60 (emphasis added).

Moreover, even if the rational basis test enunciated by the Fourth Circuit were the law, there is absolutely nothing in the record from the trial of these cases in the District Courts below to support the proposition that, in the words of the Fourth Circuit's opinion, "[t]he legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood" and that "dispersal of marketing activities [even to a building merely next door] might ameliorate the

secondary effects to some extent, thereby furthering the State's interest." The Fourth Circuit also states that such a conclusion "cannot be thought unreasonable." (A. 25 , emphasis supplied). The Fourth Circuit is unable to identify any of the supposed secondary effects; is unable to point to anything in the record showing any destructiveness of the general quality of life in any neighborhood -- in short the Fourth Circuit is straining to find even some rational basis for this legislation which simply is not there.

D. The Fourth Circuit's conclusion that the North Carolina statute is merely a regulation of time, place and manner is also contrary to the decisions of this Court.

The Fourth Circuit also made a serious mistake of First Amendment law by holding that the North Carolina statutory scheme involved here is constitutional because it is merely a regulation of time, place and manner of expression. The standard against which a purported time, place, and manner regulation must be tested is set out in Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (footnotes omitted):

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is incompatible with the normal activity of a particular place at a particular time.

It is ludicrous to suggest, as the Fourth Circuit and the North Carolina legislature did, that selling sexually oriented books and movies in one building, or selling contraceptives, are incompatible activities. Indeed, what better place is there to disseminate this type of expression than in a business where only adults eighteen or over are allowed, and which is inaccessible to children and teenagers?

The Fourth Circuit cited Grayned for its curious proposition, but apparently overlooked or ignored the test from Grayned stated above. The Fourth Circuit also cited California v. LaRue, 409 U.S. 109 (1972) and Cox v. New Hampshire, 312 U.S. 569 (1941). The decision in Cox is totally inapposite. That case simply holds that a city may require a group to obtain a parade permit, for a nominal fee, before conducting a parade. By analogy, the State may require adult bookstores to purchase business licenses, provided that the license fees are not set artificially high to suppress the types of material handled. The decision in California v. LaRue is also totally inapposite, since no alcoholic beverages are served in petitioners' bookstores. To justify the result reached in LaRue, this Court of course relied on "the broad sweep of the Twenty-First Amendment" which it said "has been recognized as conferring something more than the normal State authority over public health, welfare and morals." 409 U.S. at 114.

E. The statute in this case is also void because the restriction of First Amendment rights is greater than that essential to the furtherance of any legitimate State interest.

As noted in some detail above, the Fourth Circuit overlooked or ignored findings of fact by two federal trial courts which undercut the conclusion that the North Carolina statutory scheme imposes only an "incidental restriction on First Amendment interests . . . no greater than is essential to furtherance of the state's interest." (A. 28).

Because of the primary significant effect upon First Amendment rights found by the two trial courts, the four-part test from United States v. O'Brien, 391 U.S. 367, 377 (1968) was wrongly applied by the Fourth Circuit in this cause to measure the constitutionality of the law. It should be noted, first, that O'Brien upheld a regulation primarily of conduct or noncommunicative aspects of protected materials. The North Carolina law, on the other hand, directly impacts on actual dissemiantion of movies and printed material which are completely communicative in nature. Moreover, even where primarily conduct or noncommunicative aspects of protected materials are involved, a regulation cannot be sustained unless (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to suppression of free expression; and (4) incidental restriction on First Amendment freedoms is no greater than essential to further the imporatant or substantial governmental interest.

The North Carolina statuory scheme fails the second, third, and fourth prongs of the O'Brien test. Both of the federal trial courts which heard this case below

agreed that no legitimate governmental interest is served by the statute. As Mr. Justice Powell noted in his concurring opinion in Mini-Theaters, it is the state which bears a substantial burden to show what the compelling or substantial interest is when it seeks to limit First Amendment rights in any way. 427 U.S. at 76. The suggested, though unevidenced, interest which the North Carolina legislation is designed to serve is to improve the tone of community life by doing away with masturbation which allegedly occurred in some bookstores. A single letter, quoted by the Fourth Circuit in footnote 9 to its opinion (A. 24-A25) was introduced into the record to the effect that persons frequenting some mini-motion picture theaters in some book stores were wont to masturbate in them. This letter was introduced for the sole purpose of attempting to show what the legislature had before it when the statutory scheme was enacted. The letter was not accepted as evidence of the truth of any matter asserted therein. This is the only "evidence" in the record relied on by the state to show justification for this legislation. The record neither shows nor suggests -- not suprisingly -- that such conduct (assuming arguendo that it occurs) is exacerbated or dimished because of the presence or absence of an adult bookstore and an adult motion picture theater in the same building. Judge Dupree, one of the trial judges below, quite correctly concluded that:

> [T]he court fails to perceive a rational relationship between the worthy goal of improving community tone and this statute. At best, the means chosen by the legislature would have a minimal effect on degenerate conduct that now allegedly occurs within some adult-oriented establishments. Even this requires acceptance of the dubious logic that the stimulation provided by an adult movie is enhanced by having passed a rack of similarly-oriented books on the way into the theater, an assumption unsupported by the record.

(A. 62) (emphasis added).

Even assuming this finding is incorrect, prior decisions of this Court show that any regulation of First Amendment rights must be no broader than absolutely necessary to meet the state's legitimate compelling and substantial interests. See Grayned, supra, 408 U.S. at 117, and cases cited at n.35. In the First Amendment area, a statute passed under the police power of the state which actually does seek to further a compelling or substantial governmental interest is unconstitutional where less burdensome means are available to accomplish the asserted interest. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Schneider v. New Jersey, 308 U.S. 147 (1939).

Judge Dupree in his opinion for the Eastern District noted, quite correctly, that any of the problems set out in the letter from the health inspector can be handled directly by legislation which does not regulate the dissemination of consti-

tutionally protected books and movies. Indeed, North Carolina by statute already gives public health officers wide powers to correct unsanitary or unhealthful conditions. See N.C.G.S. §§130-19 and 130-20 (1974 replacement).

Finally, as has been pointed out above, the findings of facts by the trial courts, which should have been binding on the Fourth Circuit through Rule 52(a) of the Federal Rules of Civil Procedure, show that the restriction of the North Carolina legislation on First Amendment freedoms is not incidental; moreover, it is not narrowly drawn to make the restrictions no greater than essential to further the vague and amorphous state interest here purportedly involved.

F. The North Carolina statute is unconstitutional since it conditions the exercise of one First Amendment right on the abandonment of the exercise of other constitutional rights in the same establishment.

The effect of the statute in the present case is to penalize those who exercise their constitutional right to sell sexually oriented books and magazines by depriving them of their right to exhibit predominantly sexually oriented motion pictures or to sell contraceptives in the same establishment. Such a requirement violates the general rule that the state may not penalize a person for the exercise of First Amendment rights. For that reason it may not ordinarily require a person exercising one constitutional right to surrender another. The rule applies at least in the absence of a compelling state interest or of an extraordinary grant of con-

stitutional power over a narrow subject such as the sale of liquor. Frost and Frost Trucking Co. v. Railroad Comm'n., 271 U.S. 583, 593-594 (1926); Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Sherbert v. Verner, 374 U.S. 398, 409 (1963); Speiser v. Randall, 357 U.S. 513, 518-19 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Grossjean v. American Press Co., 297 U.S. 239, 250 (1936).

Moreover, because "sexually oriented devices," which necessarily includes contraceptives, cannot lawfully be made available under the North Carolina staturoy scheme where constitutionally protected expression in the form of a preponderance of "adult books" or "adult movies" are offered, the legislation effectively compels a trade-off between the petitioners' exercise of First and Ninth Amendment rights. Carey v. Population Services Int., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

Many of the establishments which were the targets of the statute responded to it by abandoning the sale of sexual devices and by carrying and acquiring more non-sexually oriented publications than sexually oriented ones. Even this effect of the statute is unconstitutional. To require a bookseller to carry certain types of books as a condition of selling others is a clear burden on his First Amendment rights. There is no compelling interest to justify such a requirement. Wooley v. Maynard, 430 U.S. 705, 714 (1977);

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

G. The statute is unconstitutional because it seeks to close a place which is in every other respect a proper one for the exercise of First Amendment rights to certain types of protected speech and press.

The statutory scheme here would permit, for example, the exhibition of non-sexually oriented picture films in a place where a preponderance of sexually oriented books were sold. The State may not close a place which is in every other respect a proper one for the exercise of First Amendment rights to certain types of protected speech and press. The decision of the Fourth Circuit allowing this is contrary to decisions of this Court. See, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). A case in point is Schneider v. New Jersey, 308 U.S. 147 (1939). In that case, this Court held that a municipal ordinance which banned the distribution of literature on public streets (but not in other places such as parks) was invalid. The Court specifically rejected the suggestion that the ordinance was constitutional because the right to distribute literature could be exercised in places other than streets. As this Court noted: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163-164. Accord, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

H. The statute in this case is an invalid prior restraint prohibited by the First Amendment to the United States Constitution and the Fourth Circuit's decision upholding

it is contrary to decisions of this Court.

The statute in the present case is a prior restraint since it absolutely bans the sale of books and magazines (in a place where sexual films are shown) if the books and magazines are mostly characterized by an "emphasis" on sexual activities or anatomical areas. The result is to ban the sale of some books and magazines prior to their dissemination and without regard to obscenity. Such a massive prior restraint is impermissible. Compare, Near v. Minnesota, 283 U.S. 697 (1931) with Organization for a Better Austin v. Keffe, 402 U.S. 415, 418 (1971) and New York Times v. United States, United States v. Washington Post Co., 403 U.S. 713 (1971).

The idea that the statute can be sustained because the sexual publications banned under it may be sold elsewhere has been rejected in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975).

The fact that the statutes involved in the present case provide for a subsequent punishment does not prevent the legislation from being a prior restraint. Prior restraints include not only injunctions against the expression which may be uttered in the future, and denial of licenses, but also include broad attempts to ban expression to be uttered in the future by means of a criminal statute which does not focus narrowly on the question of whether the expression itself is unprotected. For a list of cases which this Court has regarded as prior restraints (including some providing for subsequent punishment), see Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72 (1963).

II. THE STATUTE DEPRIVES PETITIONERS OF EQUAL PROTECTION OF THE LAWS AND THE FOURTH CIRCUIT'S DECISION UPHOLDING IT IS CONTRARY TO DECISIONS OF THIS COURT.

Closely related to the First Amendment problems presented by the legislation at issue, are equal protection difficulties arising under the Fourteenth Amendment. Without discernible rationale -- and without any evidentiary basis whatsoever in the record -- North Carolina subjects sexually oriented books, magazines, and movie pictures to dramatically different treatment allowed materials which are not sexually oriented within the definition of the statute. These distinctions made by the legislation deny the petitioners and their customers the equal protection of the laws. Such distinctions serve no rational purpose or goal other than the destruction or impairment of petitioners' businesses. The District Court which considered this case below made findings of facts showing that the likely effect of the statute will be to economically impair the petitioners' businesses by doubling overhead costs, wages, rents, etc., or by requiring a large inventory of non-sexually oriented books. This result will make it difficult for the petitioners to be able to continue doing businesses and will certainly restrict access to the expression here concerned even if business is continued in one store which attempts to comply with the statute. Certainly a "bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." U.S. Department of Agriculture v. Marino, 413 U.S. 528, 534 (1973).

Since the distinctions here impinge on First Amendment rights and do not serve

any compelling or substantial governmental interest and are not substantially related to the achievement of any important governmental objective, the statute violates the equal protection clause. Craig v. Boren, 429 U.S. 190 (1976); United States v. O'Brien, 391 U.S. 367 (1968); Police Department of Chicago v. Mosley, 408 U.S. 92, 102 (1972).

The statute also violates the equal protection clause with reference to its ban on the sale of contraceptives or "sexual devices." The sale of such items to adults in the absence of some substantial health hazard is constitutionally protected. Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Services, 431 U.S. 678 (1977). Even under the analysis of the plurality opinion in Mini Theatres, the North Carolina legislation does not withstand scrutiny under the equal protection clause. Speaking for the plurality, Mr. Justice Stevens observed the following with reference to the equal protection inquiry:

> The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judge Kennedy and Gubow. The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. . . .

427 U.S. at 71 (footnote omitted).

Because the North Carolina statutory scheme affects protected expression, because the interests which it purportedly serves are neither rational nor justified by any evidentiary basis whatsoever in the record, and because its ostensible goals could be achieved through the enforcement of more narrowly drawn and existing statutes, the legislation here cannot survive scrutiny under the equal protection clause. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Williams v. Rhodes, 393 U.S. 23 (1968).

III. THE STATUTORY SCHEME IN THE PRESENT CASE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND THE FOURTH CIRCUIT'S OPINION APPROVING IT IS CONTRARY TO DECISIONS OF THIS COURT.

A. The statutory scheme is unconstitutionally vague.

In the case at hand the vagueness aspects of the legislation must be squarely addressed and, once addressed, must be acknowledged as failing to pass muster under the First and Fourteenth Amendments. This Court has always held that laws imposing regulations on protected expression must be scrutinized with particular care for precision of terms and narrowness of applications. This is because uncertain or unclear statutory definitions lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked. Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Grayned v. City of Rockford, 408 U.S. 104 (1972).

Among the most troubling aspects of the statutes here involved are those which define the various adult establishments as those having movie pictures or books " a preponderance" of which are "distinguished or characterized by an emphasis" on matter "depicting, describing or relating to" certain sexual activity. Do periodicals such as Playboy "emphasize" such matter? What about Esquire? Does a book such as Lady Chatterlee's Lover? Fanny Hill? What about The Scarlett Letter? In a real sense, the entire plot of The Scarlett Letter is related to a specified sexual activity -- sexual intercourse in an adulterous relationship. All of these questions are pertinent because a great number of contemporary books and magazines deal with sexual matter. The words "depicting," "describing," "or relating to" may allow a publication to be characterized as "adult" because its overall theme may be concerned with "specified sexual activities" of the type either explicit or implicit in many love stories, and indeed in many classics of literature.

The term "preponderance" as used in the statutory scheme is unconstitutionally vague. The statute does not absolutely prohibit simultaneous dissemination of "adult" movies and "adult" books. Petitioners are absolutely without guidance on the meaning of the term "preponderance." Neither temporal nor quantitative standards are provided. There is no way of determining whether any time factor should be figured into the statute to discern whether a "preponderance" of motion pictures are of a nature meant by the legislation. Businesses which show full-length motion pictures often run the same film over several weeks. Is such a business an "adult" motion picture theater on the

day it has a film "emphasizing" those things found in the statute, and not on the other days, or should the evaluation of this cover a period of weeks or months? If so, what time period is the measure? Does the length of the film have any import within the statutory term "preponderance"? The statute does not answer any of these questions, and therefore requires petitioners to guess at their peril if they wish to exercise their First Amendment rights and protect the First Amendment rights of their customers to dissemination of both movie picture film and literature.

The legislation's definition of place where simultaneous distribution of sexually oriented publications may not occur is also unconstitutionally vague. Under that, two adult establishments may not be in the same "building, premises, structure, or other facility." These terms are undefined. The statute is problematical in this regard especially because of its lack of a mens rea or "scienter" requirement. It is of cold comfort to the petitioners that, as the Fourth Circuit suggests, the North Carolina state courts may construe the statute in such a way as to read in a scienter requirement. The legislation itself has none, and the petitioners in the present case run a risk of being convicted of a crime in order to get the North Carolina courts to construe the legislation.

Under the North Carolina statutory scheme, a crime could be committed without the defendant's knowledge of the violation. In either a high-rise building or shopping mall, for example, one operating an "adult estabishment" can be put in violation of

the law when, on another floor in the building or in a different section of the mall, another businessman opens an "adult establishment" or possesses "sexually oriented devices" (including contraceptive devices which might be contained in a pharmacy). A business next door could also be guilty of a crime based on the shifting inventory of another business. For these reasons, also, the statute is unconstitutionally vague and the Fourth Circuit's decision upholding it is wrong. See Hynes v. Oradell, 425 U.S. 610 (1976); Smith v. California, 361 U.S. 147 (1959); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

The Fourth Circuit's upholding the terms used in the North Carolina statutory scheme in reliance upon Miller v. California, 413 U.S. 15, 24 (1973) is mistaken. In Miller this Court upheld against constitutional challenge the definition of obscenity which included the requirement that the material lack serious value. This standard was designed to permit the suppression only of expression not protected by the Constitution. Here, the standard is designed to permit the suppression of material which is protected, concededly, by the First Amendment. Furthermore, the definitions used by the statutory scheme in the present case permit suppression if the materials emphasize matters "depicting, describing or relating to," sexual activity. A definition providing for the suppression or control of literature or movie pictures emphasizing matter "relating to" sexual activity has never been approved by this Court and is so far reaching and vague that its approval by the Fourth Circuit should be disapproved.

B. The petitioners have "standing" to

attack the vagueness of the legislation and the conclusion of the United States Court of Appeals for the Fourth Circuit to the contrary is in conflict with well settled decisions of this Court.

In Mini-Theaters, the theater and mini-theater involved in that case proposed to offer adult fare on a "regular" basis. As a result, under the somewhat different ordinance in that case, there was no question that the theaters were covered. This Court held, therefore, that any vagueness on the question of coverage did not affect the plaintiffs. Here, however, one of the petitioners below, Raleigh Books, had always sold a large number of non-sexually oriented books. Three of the petitioners, Hart Book Stores, Frye, and Raleigh Books, had modified their business operations by acquiring more non-sexually oriented publications than sexually oriented publications and had abandoned the sale of devices. (See Findings of Fact 10-12, A. 66-67). The result of this modification was that the establishments were probably not in violation of the statute but might find themselves in violation if their inventory tipped the wrong way.

As the findings of fact of both trial courts showed, the vagueness of the statute affected these petitioners continuously. After acquiring non-sexually oriented books as over 50% of their publication inventory, these bookstores were forced to scrutinize the books with great care to determine whether they were characterized by an emphasis on matters relating to sexual conduct. Since many paperback books from major publishers and many current novels fit this vague definition, the bookstores were forced to guess at their peril in attempting to avoid tipping their inventory and thus falling into criminal liability.

This is, therefore, the classic case where petitioners have "standing" to raise vagueness arguments. The Fourth Circuit's conclusion that the statute clearly applies to all of the petitioners overlooks a change in business operations which was forced by the passage of the statue, and also overlooks findings of fact by the United States District Court for the Eastern District of North Carolina. (Findings of Fact 10 and 11, A.66-67).

Since petitioners complain about the present effect of the statute on them and its present vagueness, they should certainly be entitled to raise this contention. The ruling of the United States Court of Appeals for the Fourth Circuit on this point is contrary to decisions of this Court and creates a sort of a "Catch-22" whereby in certain circumstances, at least, a statute can never be challenged on First Amendment vagueness grounds. A business not covered by the statute in the first instance, and consequently not affected by the statute, cannot challenge it. Under the Fourth Circuit's rationale a business originally covered by the statute but which changes its operations in an attempt to comply also cannot challenge the statute because there was a time at which it was clearly covered.

C. The statutory scheme in this case is overbroad.

The statutory scheme in this case would

ban (in certain establishments) material protected by the First Amendment. In addition, because of the definitions used in the statutory scheme, obviously material which may not be entitled to First Amendment protection -- that is, obscenity -- may also be banned.

Since the statutes bring within their proscription protected as well as unprotected expression, the statutory scheme is unconstitutionally overbroad. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Winters v. New York, 333 U.S. 507 (1948).

CONCLUSION

The decision of the Fourth Circuit in this case has restricted and degraded precious First Amendment rights far beyond what is permitted by applicable decisions of this Court. The decision below has sown the seeds of doctrine likely to result in even further restrictions and degradations of these rights. The Fourth Circuit has upheld a statute which that Court itself admitted may be silly, asinine, and inept in achieving any substantial or compelling governmental interest, but which is a legislative scheme clearly designed for its central purpose -- the harrassment of those selling sexually oriented constitutionally protected material.

For these reasons, and for the specific ones set out above, petitioners respectfully request that this Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the

Fourth Circuit.

Respectfully submitted,

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